

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
Vectren Energy Delivery of Ohio, Inc. for)
Approval, Pursuant to Revised Code)
Section 4929.11, of a Tariff to Recover)
Conservation Expenses and Decoupling)
Revenues Pursuant to Automatic)
Adjustment Mechanisms and for Such)
Accounting Authority as May be)
Required to Defer Such Expenses and)
Revenues for Future Recovery through)
Such Adjustment Mechanisms.)

Case No. 05-1444-GA-UNC

**VECTREN ENERGY DELIVERY OF OHIO, INC.'S AND OHIO PARTNERS FOR
AFFORDABLE ENERGY'S
JOINT MEMORANDUM CONTRA
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
APPLICATION FOR REHEARING**

Pursuant to Ohio Administrative Code ("O.A.C.") 4901-1-15(D), Vectren Energy Delivery of Ohio, Inc. ("VEDO") and Ohio Partners for Affordable Energy¹ ("OPAE") hereby submit this Joint Memorandum Contra the Application for Rehearing ("Final Rehearing Application") in this case filed by the Office of the Ohio Consumers' Counsel ("OCC") on July 27, 2007, and request that the Public Utilities Commission of Ohio ("Commission") deny this application for the reasons discussed below.²

¹ OCC continues to attempt to diminish the nature and value of OPAE's participation in this case by repeating its previously offered mischaracterization of case law and asserting that Citizens Coalition somehow represents VEDO ratepayers. However, the Commission has found that absent any opposition, OPAE was granted intervention in this case (and many other Commission cases) as an advocate "for affordable energy for low and moderate income Ohioans." Supplemental Order at 15.

² Citizens Coalition also filed an Application for Rehearing on July 27, 2007. This application contained virtually no specific relevant discussion of the legal issues properly before the Commission in this proceeding. Furthermore, Citizens Coalition represents no clients directly affected by the results in this proceeding.

I. INTRODUCTION

VEDO has recited the background of this case in multiple filings, most recently in its Post-Hearing Brief filed on April 23, 2007 (“VEDO’s Post-Hearing Brief” at 1-7) which recitation is fully incorporated herein. The Commission issued its Supplemental Opinion and Order (“Supplemental Order”) in this case on June 27, 2007, in which it approved the Stipulation and Recommendation filed on January 12, 2007 (“January Stipulation”), thereby affirming its September 13, 2006 Opinion and Order (“2006 Order”).³

In its 2006 Order, the Commission approved, with a modification, the Stipulation and Recommendation filed by VEDO, OCC, and OPAE on April 10, 2006 (“2006 Stipulation”). The procedural history of this case thereafter is the result of OCC’s challenge of that Order. It is worth noting that the 2006 Stipulation provided for the possibility that the Commission would modify the agreement by specifically requiring that “[p]rior to any Party seeking rehearing or terminating and withdrawing from this Stipulation pursuant to this provision, the Parties agree to convene immediately to work in good faith to achieve an outcome that substantially satisfies the intent of the Commission or proposes a reasonable equivalent thereto to be submitted to the Commission for its consideration.” 2006 Stipulation, Paragraph 13. VEDO and OPAE have complied with this requirement and have made repeated attempts to obtain finality of the results of the 2006 Order so as to initiate the assistance to VEDO’s low-income

³ OCC offers a faulty argument that a stipulation unsupported by a single customer class is, *per se*, unreasonable. There is no requirement that a representative of any specific customer class (or a subset of any customer class, for that matter) support (or decline to oppose) a stipulation in order for it to be found reasonable. Establishing such a requirement would empower any individual intervenor to a Commission proceeding who is the sole representative of a customer class to hold an otherwise reasonable stipulation hostage to its demands. In fact, the three-part test used to judge the reasonableness of stipulations was endorsed by the Ohio Supreme Court in a case in which OCC challenged a stipulation to which it had not been a party. *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 592 N.E.2d 1370, 1373, 64 Ohio St.3d 123, 126 (1992).

customers intended therein. OCC has, to the contrary, conducted a relentless campaign to obtain approval of the original 2006 Stipulation as filed. In addition to the costs of continued litigation in this proceeding, the larger cost of this campaign has been the delay of the provision of assistance programs to low-income customers and the work of the collaborative to consider, evaluate, and design enhanced and increased energy efficiency programs to be available to a larger customer base in the future.

The only difference between the 2006 Stipulation and the January Stipulation results from the modification made by the Commission to the funding source for the demand side program, the funding level for the program, and the size of the customer base to which it is available. In all other respects, the 2006 Stipulation and January Stipulation are consistent with the terms and conditions to which OCC agreed in the 2006 Stipulation. From the date that OCC filed its Notice of Termination and Withdrawal ("OCC Notice") from the 2006 Stipulation on December 8, 2006, through the date of its Final Rehearing Application, OCC has not and cannot demonstrate any harm to customers resulting from the January Stipulation.⁴ To the contrary, the economic difference between the 2006 Stipulation and the January Stipulation results in a \$4.7 million swing in favor of customers as a result of the *elimination of customer funding* and the increase of company funding. In the end, VEDO customers are subject to no more than the revenue requirement previously found reasonable in VEDO's last rate case and will benefit from \$2 million of company-funded assistance.

OCC's Final Rehearing Application raises no new issues not already considered and addressed by the Commission multiple times. VEDO and OPAE have addressed

⁴ As discussed below, OCC has not been harmed by the procedural process followed by the Commission in this proceeding either.

these issues in many responsive pleadings in the last eight months, most recently in VEDO's and OPAE's April 23, 2007 Post-Hearing Briefs and May 3, 2007 Reply Briefs, which are fully incorporated herein. VEDO and OPAE will not repeat its responses to all of the issues OCC continues to raise, but will include a brief discussion below. As before, OCC continues to misinterpret the facts, the evidence, and the law, both statutory and case, and fails to demonstrate any harm compelling a result different from that in the Supplemental Order.⁵

II. DISCUSSION

A. **Neither VEDO's Conservation Application originally filed in this case nor the January Stipulation is an application for an increase in rates.**

VEDO's Conservation Application requested approval of two riders, one of which was a first filing for a new service, and the second of which was the Sales Reconciliation Rider ("SRR"), which is **not** for an increase in rates. The January Stipulation approved in the Supplemental Order, includes only the SRR. Both the Conservation Application and the January Stipulation can be considered as Section 4909.18, Revised Code, applications. Because neither of these documents seeks an increase in rates, the statutory requirements, the pre-filing notice, newspaper notice, and investigation requirements of Sections 4909.19 and 4909.43, Revised Code, do not apply.

⁵ In fact, although this Supplemental Order may provide some legal finality to this particular proceeding, it does not conclude the consideration and evolution of the policy discussion and potential related to demand side management programs. To the contrary, the Supplemental Order explicitly provides direction to VEDO's Conservation Collaborative and its own Staff for consideration of a broader program with subsequent reporting requirements. VEDO and OPAE appreciate this opportunity to potentially build upon the approved programs which will already reach 60% of VEDO's customers and intend to pursue this diligently in the near term.

OCC continues its hyperbolic assertion that the SRR constitutes an increase in rates that permits “dollar-for-dollar recovery of sales revenues authorized in VEDO's last base rate case....” OCC’s Final Rehearing Application at 7. In spite of OCC’s support of the SRR in the 2006 Stipulation when it was paired with a \$3.6 million contribution from customers for conservation, OCC has repeatedly argued against it since the Commission paired it with a \$2 million contribution from VEDO for conservation. In the 2006 Stipulation, OCC supported the SRR as a mechanism which merely provides VEDO an opportunity to collect the revenue requirement already approved by the Commission. Beginning with its Application for Rehearing from the 2006 Order, OCC has repeatedly argued that it is a rate increase and is not permitted by law.

As indicated previously, OCC's current arguments are a mischaracterization of the SRR mechanism endorsed by the signatories to the January Stipulation (and supported by OCC in the 2006 Stipulation and approved by the Commission in its 2006 Order). The January Stipulation clearly indicates that the SRR simply provides “VEDO with a fair, just, and reasonable opportunity to collect the base rate revenue requirement established by the Commission for the Residential and General Service customer classes in VEDO's recent base rate case (Case No. 04-571-GA-AIR)” and “does not constitute an increase in rates.” January Stipulation at 8 and 10. The actual SRR mechanism permits VEDO to recover only “the difference between VEDO's weather-normalized actual base revenues and the base revenues approved in VEDO's most recent rate case, as adjusted for customer additions.” *Id.* In the event of usage levels below that anticipated in the last rate case, charges to customers are limited to the amount necessary to permit VEDO to recover the fixed costs found reasonable by the

Commission in its last rate case. Company Ex. 2 at 13. Conversely, if customer usage increases above the level anticipated in the last rate case, the SRR would reduce actual bills to customers. *Id.* at 14. Contrary to OCC's claim that the SRR somehow provides a rate increase to benefit VEDO, the fact is that the SRR simply affords VEDO a reasonable opportunity to collect the revenue requirement authorized in its recent rate case in accordance with a fundamental objective of regulation.⁶

B. There is ample statutory authority for the Commission's Supplemental Order.

VEDO and OPAE have previously supported the Commission's decision to consider its Conservation Application, the 2006 Stipulation, and the January Stipulation pursuant to Section 4929.05, Revised Code, consistent with the record incorporated from VEDO's most recent rate case, as being appropriate and lawful. VEDO has also demonstrated that authority to approve the SRR is supported not only by Section 4929.11, Revised Code (as filed by VEDO and supported by OCC⁷), but also by Section 4909.18, Revised Code, pursuant to which it can be considered either as the Section 4908.18 application **not** for an increase in rates contemplated by Section 4929.05, Revised Code, or as a stand-alone application **not** for an increase in rates. Either way, the Conservation Application, which contemplated a first filing for a new service and the SRR, which is **not** an increase in rates, could have been approved without hearing.

⁶ It should also be noted that this is a two-year pilot designed to allow the Commission to review the SRR, and the start of a process to identify energy conservation programs that will help provide rate stability and affordability for customers while creating jobs and promoting the development of new technologies.

⁷ OCC supports the Commission's authority to consider the Conservation Application pursuant to Section 4929.11, Revised Code. In its October 13, 2006, Application for Rehearing, OCC represented that it was "within the confines of R.C. 4929.11 that OCC agreed to implement..." the SRR. OCC October 13 Application for Rehearing at 7.

Finally, the Commission could have exercised its authority in Sections 4905.26 and 4905.37, Revised Code, to consider and remedy the adequacy of the utility's opportunity to realize its revenue requirements.

Ironically, the Commission's choice to consider VEDO's Conservation Application pursuant to Section 4949.05, Revised Code, provided OCC with significantly more process than had the Commission employed VEDO's choice (and OCC's preference) of Section 4929.11, Revised Code, or, alternatively, Section 4909.18, Revised Code. Section 4929.11, Revised Code, has no associated statutory filing or procedural requirements.⁸ Section 4909.18, Revised Code, permits the Commission to approve an application not for an increase in rates without a hearing, after which the Commission must, if practicable, issue an order within six months of the date the application was filed.

OCC did not raise any opposition to the use of Section 4929.05, Revised Code, or the manner in which it was employed by the Commission during its consideration, first of VEDO's Conservation Application and later of its consideration of the 2006 Stipulation supported by OCC. It was only after the Commission decided to modify the 2006 Stipulation to increase program funding provided by VEDO that OCC began to

⁸ The wide procedural discretion permitted the Commission by Section 4929.11, Revised Code, was even specifically noted by the Attorney Examiner in his February 7, 2006, Entry in which he decided to apply the process requirements of Section 4929.05, Revised Code, in this case. In making that determination, he wrote that Section 4929.11, Revised Code, "... does not delineate a specific procedure or basis for the Commission's consideration of the instant application...." February 7, 2006 Entry at 2.

assert procedural deficiencies.⁹ Regardless of OCC's claims, VEDO has previously demonstrated compliance with the statutory requirements attendant to Section 4929.05, Revised Code, in this case.¹⁰ VEDO Post-Hearing Brief at 12-16. In addition to all of the process afforded to OCC prior to the issuance of the 2006 Order, the process was substantially replicated for the remainder of the proceeding, in spite of the fact that no issues not already raised by the original Conservation Application were ever raised.¹¹

In sum, all statutory process requirements even remotely designed to protect OCC's interests resulting from the Commission's decision to transform VEDO's

⁹ Section 4929.05, Revised Code, addresses only those circumstances in which a natural gas company files an application pursuant to that section. There is no statutory procedural requirement specified for instances in which the Commission transforms a utility application made pursuant to other authority into an application for an alternate regulation plan pursuant to Section 4929.05, Revised Code. In this instance, by OCC's own admission, VEDO's Conservation Application could have been pursuant to the authority granted by Section 4929.11, Revised Code, which specifies no procedural requirements at all.

¹⁰ OCC's arguments to the contrary depend largely on its erroneous characterization of the SRR as an increase in rates. Consequently, OCC has no legitimate jurisdictional claim here. From a practical perspective, if the Commission had jurisdiction to consider the 2006 Stipulation supported by OCC, it has jurisdiction to render a decision on the January Stipulation. OCC's claim that Sections 4909.15 and 4929.05, Revised Code, are mutually exclusive has no basis in law. In fact, in this case, VEDO has not proposed to establish rates by a method different from that in Section 4909.15, Revised Code, but has assumed that method as applied in Case No. 04-571-GA-AIR. VEDO has proposed a mechanism designed to promote efficiency and better assign fixed costs to the cost causer, permitting individual customers to avoid or offset said costs by reducing consumption. Section 4929.01(A) speaks to the use of a method different to that prescribed in Section 4909.15, Revised Code, for establishing rates but also provides that an alternative rate plan may include other provisions that promote rate stability, that tend to assess costs to the entity which causes the incurrence of the cost, or promote and reward efficiency. The result of the plan approved by the Commission in its 2006 Order has no effect on revenue requirements found by the Commission to be reasonable, pursuant to Section 4909.15, Revised Code. Moreover, that revenue requirement was set quite recently, ensuring that customers are paying the actual cost of providing service.

¹¹ In spite of the fact that, in the January Stipulation, VEDO, OP&E, and Staff simply asked the Commission to confirm its previously-rendered decision following its consideration of the record in this case in which all parties had been afforded due process, defense of the reasonableness of the January Stipulation (as if the results it provided were not identical to those of the Commission's ordered alternative regulation plan in its 2006 Order) was required of VEDO, OP&E, and Staff. Ironically, the process followed subsequent to OCC's Notice of Withdrawal served to provide OCC, after denial of its October 13 Application for Rehearing, what amounted to a second rehearing of the 2006 Order, with added significant new rights of discovery and the presentation of evidence which would not have been available to OCC had its October 13 Application for Rehearing been granted. The result is a generous abundance of process provided by the Commission to OCC which should obviate all criticism by OCC.

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application into an alternative regulation plan application have been satisfied except that required by Section 4929.07, Revised Code¹², and OCC has had the opportunity to make its case with respect to the original Conservation Application, the 2006 Stipulation, the 2006 Order, and the January Stipulation in this case.¹³

III. CONCLUSION

After all of the red herrings are eliminated from the Commission's consideration of the Conservation Application originally filed in this case and the January Stipulation subsequently submitted by VEDO, OPAE, and the Staff, there are only two legitimate, relevant issues to be addressed and answered here. These issues are: (1) Does the Commission have statutory authority to address and resolve the issues raised by the Conservation Application and January Stipulation, and (2) Are VEDO's ratepayers harmed by the Commission's decision in this proceeding? As VEDO and OPAE have demonstrated many times since this case was filed on November 28, 2005, the answers to these questions are, respectively, yes and no. VEDO and OPAE hope for a resolution to this case soon so as to permit the delivery of assistance programs intended by the Commission in its 2006 Order and the dedication of resources to comply with the Commission's expectations that parties will work together to consider and design energy efficiency programs beyond those resulting from this case.

¹² Section 4929.07, Revised Code, prescribes the responses the Commission has available to it in the event that notice of the utility's acceptance of the Commission's order of an alternative regulation plan is given and a tariff has been filed in compliance thereof. OCC apparently has no objection to the fact that, following the issuance of the 2006 Order, the requirements of Section 4929.27, Revised Code, were not met.

¹³ OCC's claim that the Commission is in error for failure to require VEDO's compliance with Rule 4901:1-19-05, O.A.C. to this case is particularly disingenuous. OCC Final Rehearing Application at 29. With OCC's support, VEDO sought and obtained a waiver from the requirements of this rule, which is permitted by Rule 4901:1-19-03, O.A.C. April 5, 2006 Entry at 2.

WHEREFORE, for the reasons set forth above, VEDO and OP&E respectfully request that the Commission deny OCC's Final Rehearing Application.

Respectfully submitted,



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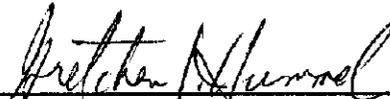


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Joint Memorandum Contra the Office of the Ohio Consumers' Counsel's Application for Rehearing* has been hand-delivered, sent electronically or served *via* ordinary U.S. Mail, postage prepaid, this 6th day of August, 2007 to the following parties of record.


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